

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place – Room 503
Boston, MA 02108
617-979-1900

HENRY LIMA,

Appellant

G1-21-077

v.

CITY OF SOMERVILLE,

Respondent

Appearance for Appellant:

Henry Lima, *Pro Se*

Appearance for Respondent:

Jason Piques, Esq,
Assistant City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Commissioner:

Paul M. Stein

Summary of Decision

The Commission allowed the 2021 bypass appeal of a candidate for appointment as a Somerville Reserve Firefighter who, for the second time, was not given a fair, impartial and reasonably thorough review and was treated differently than other candidates (most of them with ties to the City), contrary to civil service law, the terms of the Commission's prior Decision allowing the candidate's 2016 bypass appeal for similar reasons and the 2019 Settlement Agreement between the City and the candidate settling the candidate's related discrimination claim against the City.

DECISION

The Appellant, Henry Lima, acting pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission) from the decision of the Mayor of the City of Somerville (Somerville), the Appointing Authority, to bypass him for appointment as a Reserve Firefighter in the Somerville Fire Department (SFD).¹ A pre-hearing conference was held via videoconference (Webex) on

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

May 18, 2021 and a full hearing was held via video conference (Webex) on August 3, 2021 and August 31, 2021, which was recorded via Webex.² The Commission received Proposed Decisions from the parties on October 29, 2020. As explained below, Mr. Lima's appeal is allowed.

FINDINGS OF FACT

Sixty-four (64) exhibits were introduced into evidence (Resp.Exh.1 through Resp.Exh.48; App.Exh.1 through App.Exh.16). Based on the exhibits, the testimony of the witnesses:

Called by Somerville:

- Charles J. Breen, Sr., SFD Fire Chief
- Christopher Major, SPD Assistant [Deputy] Fire Chief
- Michael Faria, Detective, Somerville Police Department
- Janice Delory, Interview Panelist
- Anne Gill, Somerville Director of Human Resources

Called by the Appellant:

- Henry Lima, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes the following facts:

1. The Appellant, Henry Lima, currently in his early 40's, is a resident of Somerville. In 1995, he dropped out of high school to work-full time and care for his elderly grandmother and his uncle. He received his GED in 1998 and has completed two years of college. He is bilingual (Portuguese & English). He has been certified as a first responder. He did not finish his college degree but did complete a semester course in fire science. (*App.Exh.11; Resp.Exhs.3 & 38; Administrative Notice [Finding 1 thru 3, Commission Decision, Lima v. City of Somerville, 30 MCSR 103 (2017), aff'd sub nom. City of Somerville v. Lima, Suffolk Sup.Ct. C.A. SUCV 2017-0990 (2018) [Lima*

²A link to the recording provided to the parties. If there is a judicial appeal of this Decision, the plaintiff in the judicial appeal will be obligated to use the recording to supply the court with a written transcription satisfactory to the court, to the extent that they wish to challenge the Decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

1)]; Testimony of Appellant)

2. Mr. Lima has over 20 years of experience in security and law enforcement work, including Head of Security for a restaurant/bar (1995-2006), Hospital Police Officer/Constable (1997-2000), Security Officer (2005-2006), and County Correctional Officer/Deputy Sheriff (1999-2005 & 2008-2016). (*App.Exh.11; Resp.Exhs.3 & 38; Administrative Notice, [Finding Nos 4 thru 7, Lima 1)]; Testimony of Appellant)*

3. In 2010, Mr. Lima began to suffer from various medical ailments attributed to toxic exposure to chemicals in his work as a County Correctional Officer. His time and attendance suffered as a result and, eventually, he was granted medical leave. In September 2016, Mr. Lima was awarded workers' compensation benefits for his workplace injuries, retroactive to 2015. He did not return to the workforce until August 2018. (*App.Exh.11; Resp.Exhs.3 & 38; Administrative Notice, [Finding Nos 4 thru 7, 28 & 66, Lima I)]; Testimony of Appellant)*

4. In 2014, Mr. Lima passed the civil service examination for firefighter administered by the Massachusetts Human Resources Division (HRD). His name was placed on the eligible list established on November 1, 2014. (*Administrative Notice, [Finding Nos 4 thru 7, Lima I]*)

5. Mr. Lima was initially considered for appointment as a Somerville Reserve Firefighter in July 2015 when his name appeared on Certification 03043. His application was processed and, after a background investigation, interview and initial psychological screening³, he was asked to withdraw his application. When he declined, he was issued a bypass letter dated February 19, 2015, citing his allegedly poor credit, attendance issues and poor interview (specifically, a response that suggested he did not appreciate the importance of following orders and operating within the chain

³ Somerville no longer requires a candidate to submit to medical or psychological screening prior to issuance of a conditional offer. *Administrative Notice, [Finding No 34, Lima I]*

of command.) When Somerville decided to appoint fewer candidates than initially planned, Mr. Lima was informed that his name was not high enough to be reached to fill the smaller number of positions, and he was not, in fact, bypassed. (*Administrative Notice, [Finding Nos 15 thru 55, (Lima I); Testimony of Appellant]*)

6. In April 2016, Somerville obtained a new certification (Certification 03715) for appointment of additional Reserve Firefighters. Mr. Lima was considered, interviewed and, by letter dated June 9, 2016, again bypassed for his failure to dispel the previously identified “grave concerns” about his suitability. (*Administrative Notice, [Finding Nos 60 thru 68, Lima I]*)

7. Mr. Lima appealed his June 2016 bypass to the Commission which allowed his appeal and ordered that he be placed at the top of the next certification for the position of Reserve Firefighter for consideration that employed a process that, unlike the one that resulted in his 2016 bypass, “has not been compromised by a perception that a different standard was applied to candidates whose relatives were longtime employees of the City”. The Commission ordered that Somerville “shall ensure that a de novo review of his candidacy is conducted with no negative inferences drawn from the appointment process which was the subject of [his 2016] appeal.” (*Administrative Notice, [pp 19-23, Lima I]*)

8. Mr. Lima also filed a claim with the Massachusetts Commission Against Discrimination against Somerville for employment discrimination, which the parties settled in 2019 by agreement (the 2019 MCAD Settlement). (*Resp.Exh.6*)

9. In addition to monetary compensation (\$10,000) paid by Somerville to Mr. Lima, the 2019 MCAD Settlement also provided, in relevant part:

4. The parties additionally agree to the following procedural steps relative to LIMA's consideration and hiring review process when his name is reached at the top of the next certification. . . . [T]he CITY shall provide LIMA with the usual civil service process for firefighter candidates on the Human Resources Division eligible list:

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- a. When the City begins the hiring process for this list, an updated background check will be performed of LIMA and provided to the City of Somerville Public Safety Interview Panel ("Panel"). The updated background check shall be limited to findings concerning only new or updated information since . . . the 2016 Hiring Process. As with other candidates, the background investigator . . . shall be provided with any information he/she deems necessary from the 2016 Hiring Process in order to conduct the updated background investigation into LIMA.
 - b. LIMA may then be subject to questioning at the Panel's option after the updated background check is provided to the Panel. The Panel's questioning is limited to any new or updated information since the date of his last background check by the CITY during the 2016 Hiring Process. Questioning by the Panel, if any, will be audio recorded and a copy of the audio recording will be provided to LIMA no later than ten (10) business days after the questioning.
 - k. If the CITY decides to bypass or not appoint LIMA to the position . . . it will notify LIMA of its decision in writing in accordance with Civil Service standards.
 - l. Lima shall have a different Interview Panel and background investigator than those involved in the 2016 Hiring Process.
 - m. The CITY will not draw any negative inferences from the 2016 Hiring Process in making its employment decision on LIMA's candidacy.
 - n. The CITY shall treat LIMA the same as any other candidate with the exception of any specific changes to the process identified above.

14. LIMA expressly reserves the right to take any action arising from any non-hire by the CITY and/or any other action by the CITY unrelated to the 2016 Hiring Process that occurs after the effective date of this Agreement, but forever waives all rights to raise any claims, issues, legal challenges, causes or action or make any legal argument in any forum in the future relative to his non-hire by the City during the 2016 Hiring Process.

(Resp.Exh.6) (emphasis added)

10. By 2018, Mr. Lima was medically cleared and able to work. He had difficulty finding a job, sometimes being told he was over-qualified or that he was underqualified for jobs that required a college degree.⁴ He began working as a driver for ride-share companies and took another seasonal job for a snow removal company. *(Resp.Exh.3; App.Exh.11; Testimony of Appellant)*

⁴The institutions to which Mr. Lima applied for employment included hospitals (Mass. General, Cambridge Hospital), utilities (National Grid, Eversource), and universities (Tufts, Harvard) *(Testimony of Appellant)*

11. Pursuant to the Commission’s Decision in *Lima I*, Mr. Lima’s name appeared at the top of Certification 06668 issued to Somerville on October 2, 2019 for appointment of Reserve Firefighters. He signed the certification willing to accept and completed the required application paperwork. (*Stipulated Facts; Resp.Exh.1; App.Exh.11*)

12. Mr. Lima’s 2019 application listed his entire employment history since 1994, including his prior 20 years of experience in law enforcement, most recently as a county correctional officer. until September 2016 (*App.Exh.11; Resp.Exhs.2 &3*)

13. Mr. Lima disclosed his “workplace injury” that resulted in his unemployment from October 2016 until August 2018, when he began full-time work as ride-share driver. He also reported that he took seasonal employment as a snowplow operator. (*App.Exh.11; Testimony of Appellant*)

14. Mr. Lima’s credit report showed good credit until 2015, when he began to fall behind. His application stated: “My financial hardship/credit hardship is directly related to a medical condition suffered during a workplace incident/loss of employment.” He provided a letter dated October 18, 2019 from a debt relief agency, showing that he had satisfied one creditor and was making regular bi-weekly payments through which, the letter stated, “he will be able to settle and completely rid himself of [all of his] obligations.” (*App.Exh.11; Resp.Exhs.2 &7; Testimony of Appellant*)⁵

15. Due to the COVID-19 State of Emergency, Somerville suspended the hiring and resumed in November 2020. (*Resp.Exh.2; Testimony of Appellant, Chief Breen, Det. Faria & Ms. Delory*)

16. Michael Faria, a Somerville Police Department (SPD) Detective, conducted a background investigation of Mr. Lima. When Det. Faria inquired of the Somerville HR department, he was told that because of Mr. Lima’s prior civil service appeal, “he could only go back to 2016” and

⁵ Chief Breen discounted the debt relief letter because he believed the agency was Mr. Lima’s advocate. (*Testimony of Chief Breen*)

that he was “only to consider new or updated information” since 2016. Thus, he was not provided with a copy of Mr. Lima’s 2016 application and did not take steps to investigate Mr. Lima’s work history, save for employment after 2016. Had he not received those instructions, Det. Faria would have followed the customary practice in conducting public safety background investigations and “go back as far as we could go.” (*Testimony of Appellant, Det. Faria & Ms. Delory*)

17. Det. Faria confirmed that Mr. Lima had a clean criminal record and a good driver’s history. He obtained a positive employment reference from the snowplow company, as well as positive interviews with three personal references. Mr. Lima provided three additional personal letters of reference. (*Resp.Exh.2; App.Exh.9; Testimony of Det. Faria*)

18. Det. Faria was unable to contact anyone at the ride-share companies who could provide a reference. Mr. Lima provided documentation that he had received an overall top customer rating of 5.0 with one company and 4.98 with the other company (with 1000+ five-star trips), along with a letter from one of the ride-share companies that he had worked as a driver from September 2018 to present, with the last trip logged in February 2020. He provided a letter from the other ride-share company confirming that he worked as a driver from August 2018 to February 2020. (*Resp.Exh.2; App.Exh.5; Testimony of Appellant & Det. Faria*)⁶

19. Det. Faria made no attempt to contact the county sheriff’s office or Mr. Lima’s other prior public safety employers. (*Resp.Exh.2; Testimony of Det. Faria*)

20. On November 18, 2020, Det. Faria conducted a home visit with Mr. Lima, whom he found suitably dressed and his apartment “clean and in order”. (*Resp.Exh.2; Testimony of Appellant; Det. Faria*)

⁶ Mr. Lima’s work for the ride-share companies was interrupted in February 2020 by the announcement of the COVID-19 State of Emergency. (*Resp.Exh.2; Testimony of Appellant*)

21. Mr. Lima explained his financial problems to Det. Faria in detail as well as the efforts he was taking to work through them. In his background report dated November 25, 2020, Det. Faria cited Mr. Lima's approach to his credit situation as one of his "Positives":

"Mr. Lima is working with the National Debt Relief program to pay his outstanding debt. Mr. Lima's references all spoke very highly of him[H]e has a good driving history."

Det. Faria stated as "Negatives":

"Mr. Lima was working for [a ride-share company] but is currently unemployed due to the pandemic. He is still a seasonal worker for a snow removal company."

(Resp.Exh.2) (emphasis added)

22. Somerville conducted semi-structured interviews with approximately twenty-four (24) candidates, including Mr. Lima, over a two-week period from February 5 to February 16, 2021. The interview panel included Fire Chief Breen, Assistant Fire Chief Major and Ms. Janice Delory, a former Chief of Staff to Somerville Mayor Curtatone. Candidates were asked a series of twenty-one questions prepared in advance as well as individualized questions pertinent to each candidate. The interview panel members had access to each candidate's full application packet, including, but not limited to, a resume, background investigation, references and credit report. Each panel member kept detailed notes. The interviews were audio recorded. No specific voting, scoring or ranking method was followed. After each interview the panel had a general discussion about the candidate interview performance. After all interviews were completed, Chief Breen convened the panel again conferred and reached a consensus on who to recommend to the Mayor for appointment and who should be bypassed. *(Resp. Exhs.3, 4, 7 through 48; App.Exhs.4, 5, 9 & 11; Testimony of Chief Breen, Ass't Chief Major & Ms. Delory)*

23. Mr. Lima was one of the first candidates to be interviewed on February 5, 2021. The panel was instructed that, pursuant to the Commission's Decision in Lima I and the 2019 MCAD Settlement, Mr. Lima could only be asked about any new or updated information obtained after

the 2016 hiring process. The panelists understood this meant they had to disregard any information about Mr. Lima's before 2016. (*Testimony of Chief Breen, Ass't Chief Major & Ms. Delory*)

24. At the interview, Mr. Lima said his strengths included being a "team player". When asked if he preferred to work alone or as part of a team, he said that he "prefers teams". He explained his employment was "mostly teams". He provided an extensive description of his duties with the County Sheriff's Officer: he worked in the command center, the "most structured" unit in the jail, and in housing units, which called for him to handle drug overdoses and other "pretty rough stuff". He received the Sheriff's "Excellent Performance Award" and served as a member of the Sheriff's Honor Guard. He indicated he also currently works as a snowplow operator, which required that he report punctually and work with the "team" of other plow operators and would be starting a new job in April for an HVAC company. (*Resp.Exhs.4 & 38; Testimony of Appellant*)

25. Mr. Lima explained to the panel that the ride-share companies offered the first employment he was able to obtain after being out of work from October 2015 to August 2018 after his industrial accident. He worked eight to twelve hours a day and received the highest ratings from his customers. It was the only job that he has worked alone without a supervisor. He said that the legal issues arising from his industrial accident took up a lot of time and the ride-share companies "afford[ed] me a schedule" to deal with those matters. (*Resp.Exhs.4 & 38; Testimony of Appellant*)

26. The only question Mr. Lima was asked about his credit: "Are you still in a debt relief program?", to which he replied that he was. (*Resp.Exh.38; Testimony of Appellant*)

27. Prepared Question No. 13, stated: "You report to work on the night shift. The night commander is in his office doing paperwork. There is a firefighter on duty who appears to be under the influence of alcohol, and you detect the odor of alcohol. What, if any, action would you take and why?" (*Resp.Exhs.4 & 38*)

28. Mr. Lima answered Question No. 13 as follows:

“This situation has happened throughout my career . . . First and foremost, I would probably pull the firefighter aside and have a talk with him, ask him how he’s doing, if everything is alright at home. Um, I would inform him that I detected the odor of alcohol coming from him and that maybe he should take a personal day and he should contact the employee assistance program officer. If a firefighter is coming to work drinking, then he obviously has some sort of problem and he needs help. I would also contact his union steward and would recommend the union steward contact the shift commander so that we could all get together, and uh the employee assistance program officer, union steward, shift commander⁷ and get this gentleman the help he needs. We’re a team, he’s member of the team, he obviously needs help. Get him off the shift, get him home, whether it be a department vehicle, Uber, Lyft, check up on him, but I wouldn’t allow him to work.”

Ms. Delory then asked: “So, if he says, I’m fine, you’re mistaken”, to which Mr. Lima responded:

“If I honestly believe that he has been drinking and there’s alcohol on his breath, I could not in good conscience let him work the shift. He puts himself at risk. He puts me at risk. He puts the team at risk. He puts the individuals we are trying to rescue at risk. I can’t let him get behind the wheel of a ladder truck, an engine, or any sort of vehicle. So I would try to get him the help he needs but I would not allow him to work the shift. I would get us all together as a team and get this gentleman the help he needs.”

“Unfortunately, working as a corrections officer is a very stressful job, most civil service jobs are, and, unfortunately, sometimes the stresses cause individuals to turn to alcohol. It a common occurrence. I understand the situation, but people’s safety comes first.”

(*Resp.Exhs.4 & 38*) (*emphasis added*)

29. Following his interview, at the request of Somerville’s HR Department, Mr. Lima provided documentation about his work for the ride-share companies. These documents established that Mr. Lima had completed approximately 2700 trips for the ride-share companies annually. He received approximately \$32,000 in gross income in 2019 for this work. He also provided a copy of his 2018-2019 auto insurance policy covering his car and a motorcycle. (*App.Exh.4*)

30. By letter (drafted by Ms. Delory) dated March 11, 2021, Mayor Curtatone informed Mr. Lima that he had been bypassed for the following reasons:

- POOR CREDIT HISTORY:
“Your credit history indicates several accounts that were charged-off . . . including accounts at Bank of America, Old Navy and Navient, a student loan account. In addition,

⁷ Ms. Delory’s interview notes Mr. Lima would “contact steward & shift commander”. Dep. Chief Major’s notes do not mention this; Chief Breen’s notes stated: “No supervisor?” (*Resp.Exh.4*)

there was a vehicle repossession in October 2019. The panel acknowledges that you entered into a debt relief program in October 2019 but up until that point you showed a history of financial irresponsibility and an inability to meet your obligations.”

- INADEQUATE WORK HISTORY:

“In reviewing your work history for the past 4 years and 5 months, you listed part time work at [ride-share companies] . . . and at [a company] where you did snow plowing. All of these jobs require you to work alone and independently. . . but as a firefighter you will be required to work a set schedule that is not of your choosing. We were only able to obtain one reference [the snow plow company] . . . where you made less than \$1,200 in 2019.

“The panel found it impossible to judge your candidacy using one reference from a part-time/ seasonal snow plowing position you held in 2019. We are unable to assess your reliability, professionalism, and ability to work with others.”

“You were asked [on the application] how many times you have been tardy at work or school during the past five years and you responded that you had not been tardy back to June 2015 and could not . . . obtain records prior to that. All of your most recent positions . . . are all jobs that you can work at will and don’t have specific reporting times. It could not be verified from your recent work history whether you have a track record of being punctual and present at work. . . . “

- QUESTIONABLE DESIRE TO WORK AS A TEAM PLAYER

“The panel also questioned why you would not pursue full time work in security over the past 4 years considering you had spent so much of your career working in the security field. You responded that you needed flexibility to pursue your legal issues. Many working people have . . . obligations . . . and manage to balance those will full time careers. It brings into question how serious you are about pursuing a professional career in fire services.”

“[D]uring the interview . . .[y]ou were asked on Question 9 whether you preferred to work alone or as part of a team and you responded that you preferred working as part of a team. This answer is inconsistent with your recent work history where you have chosen to work alone, without direct supervision and at hours of your own choosing.”

- WRONG ANSWER TO THE IMPAIRED FIREFIGHTER SCENARIO

“On Question 13 when asked what action you would take if there were a firefighter on duty who appears to be under the influence of alcohol . . . [y]ou stated that you would work as a team to get him the help he needs. You seemed to take matters into your own hands rather than immediately report him to a superior officer . . . This was an especially concerning answer from someone who worked in a chain of command structure in the past.”

(Resp.Exh.5; Testimony of Ms. Delory)

31. On May 11, 2021 and May 20, 2021, the Confirmation of Appointments and Personnel Matters Committee of the Somerville City Council (Confirmation Committee) voted to confirm the appointment of nine candidates (one of the previously appointed candidates had withdrawn)

as SFD Reserve Firefighters from Certification 06668, all of whom ranked below Mr. Lima.
(*Stipulated Facts; App.Exhs.2, 3 & 10*)

32. At the outset, HR Director Gill was asked why the “534” candidate on the certification, which referred to Mr. Lima, was not before the committee after he had won his civil service appeal.
(*App.Exhs. 2 & 10*)

33. The committee minutes state:

“Ms. Gill replied that the selection committee, comprised of Chief Breen, Assistant Chief Major and former Chief of Staff Janice Delory, felt that the candidate didn't have the experience to be put on list, adding that he won his appeal on a procedural matter, and that would not negate the requirements of the position nor the selection committee's decision that he was not qualified. Councilor Scott said that case was won because a member of the interview panel and someone who was guiding the process was found to have improperly influenced the process in order to go very far down the list and hire his nephew. Councilor Clingan asked what would happen if this individual filed another appeal and was successful again. Ms.Gill said she didn't know the answer but would find out. Chief Breen noted that 6 individuals ... were by-passed to get to the candidates before the committee tonight. Ms. Gill commented that civil service is a law of opportunity and exists to have objective criteria in place when selecting candidates. The interview process is stringent and looks for qualities, skills and experience related to being a fire fighter. She ... has never seen a list manipulated in her experience. Councilor Mbah asked what [Lima] did not have that resulted in him being by-passed and Chief Breen stated that he could not discuss it due to the appeal process.⁸ Councilor Scott said he had concerns with the makeup of the selection committee by having both the Chief and Assistant chief on the committee.

(*App.Exhs.2 & 10*)

34. At the Commission hearing, the following facts, among others, about the ten (10) originally selected candidates were introduced in evidence:

Candidate C1 – Lifelong Somerville resident. Uncle and cousin are firefighters. His personal reference, a former City Councilor said he “does not know how the applicant

⁸ By the time of the Confirmation Committee meeting, Mr. Lima had filed this bypass appeal (on April 5, 20210. (*Stipulated Facts; Claim of Appeal*))

manages his finances.” Five jobs over the past five years in the hospitality industry as a brewer, bartender and chef. Chief Breen commented “Diversity question was like pulling teeth,” but not a serious problem, because he was not the only candidate (unlike Mr. Lima, who is a first generation American) who gave a problematic answer to that question. (*Resp.Exhs.2, 4, 8 thru 10, 38 & 39; App.Exh.12; Testimony of Appellant & Chief Breen*)

Candidate C2 – Uncle is President of Somerville Municipal Employees Association, another uncle served with Somerville Police Department. Salesman for five different employers since 2012. His mother is his supervisor and provided his current employment reference. (*Resp.Exhs.2, 11 thru 13; App.Exhs.2, 13; Testimony of Chief Breen*)

Candidate C3 – Call firefighter in another community, hired as full-time firefighter in Nashua during hiring process. Side job as self-employed owner of window cleaning company. Per Chief Breen’s interview notes on the impaired firefighter scenario question: “Does not notify night commander immediately.” (*Resp.Exh.2, 14 thru 16 & 41; App.Exh.2*)

Candidate C4 – Currently firefighter in North Carolina. Previously was [ride-share] driver but only in summer and played semi-professional hockey the rest of the year, experience Chief Breen found sufficient to show an ability to work in a “team” environment. Mother works at Registry of Deeds for Mayor Curtatone’s sister. Member of sister’s law office provided a reference. Per Chief Breen’s interview notes on the impaired firefighter scenario; “ Approach the Firefighter. Ask if drinking. If yes, advise him to report to officer and tell him he needs to go home. If he doesn’t cooperate, notify

officer.” (*Resp.Exhs.2, 17 thru 19 & 42; App.Exhs.2 &.14;Testimony of Chief Breen & Dep. Chief Major*)

Candidate C5 – Accounting background. One year in current job and eight months in job before that. Per Chief Breen’s notes on the impaired firefighter scenario: “Talk to FF. . . encourage him to go to supervisor. If not, would have to report him.” (*Resp.Exhs.2, 20 thru 22 & 43: App.Exh.2*)

Candidate C 6 – Mother works for Somerville Public Schools. He worked for five years as a Somerville Public School library aide and special ed paraprofessional. Personally known by one of the committee members. Current and prior experience as carpenter and audio/video technician. (*Resp.Exhs.3, 23 thru 25*)

Candidate C7 – Heavy equipment operator for Somerville DPW. Known to Confirmation Committee Chair since junior high school. Interview notes: “Credit Issue: After college was trying to play football professionally. Didn’t work full-time so fell behind on student loan.” Background report noted as a NEGATIVE: “[H]ad some issues paying credit back in 2013-2014 but it appears he is paying all debt as agreed since 2018.” On the impaired firefighter scenario, Chief Breen noted: “[D]oesn’t want to be labeled as a rat . . . Was a bit hesitant but ultimately would go to a supervisor.” (*Resp.Exhs.3, 26 thru 28 & 45; App.Exh.15; Testimony of Dep. Chief Major*) (*emphasis added*)

Candidate C8 – 2017 Somerville High School graduate. Volunteer with Somerville Auxiliary Fire Department and received positive reference from the supervisor, an SPD Fire Lieutenant. Other employment at a car wash and as a waiter in a restaurant where

he had been reported to have a record of severe tardiness which he excused as a misunderstanding. (*Resp.Exhs. 3, 29 thru 31; App.Exh.16; Testimony of Chief Breen*)

Candidate C9 – Father is an SFD Fire Lieutenant. Two years’ experience in hospital security. Confirmation Committee Chair said her father also was a firefighter and the “bond among the department is strong” so candidate “would fit well.” (*Resp.Exhs.33 & 34; App.Exhs.3 &16*)

Candidate C10 – Belmont Firefighter/Paramedic – only female appointed. (*Resp.Exhs. 3, 36 thru 37*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Original appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive, negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown,

by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

The governing statute, G.L. c. 31, gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority’s action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” Id. (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

ANALYSIS

Somerville failed to establish by a preponderance of the evidence that it made a reasonably thorough review of Mr. Lima's application for appointment as an SFD Reserve Firefighter and that the decision to bypass him was reasonably justified. Somerville arbitrarily limited its review of Mr. Lima's credentials, discounting nearly twenty-five years of highly relevant experience, based on an erroneous application of this Commission's Decision in *Lima I* that allowed his 2016 bypass appeal, as well as a misinterpretation of the conditions imposed on Somerville by the 2019 MCAD Settlement pertaining to the discrimination charges brought by Mr. Lima against Somerville, also arising from his unjustified 2016 bypass. Once again, Somerville failed to heed the Commission's admonition to steer clear of any hint of personal bias or nepotism in civil service hiring and promotional decisions, and, for the second time, has infringed on Mr. Lima's civil service rights. He must be granted another opportunity for appointment to the SFD.

The first reason provided by Somerville for bypassing Mr. Lima – poor credit – is based on an erroneous and incomplete review of the relevant facts. The credit report provided to Somerville by Mr. Lima showed that his credit was good until 2015, when he began to fall behind, which Mr. Lima clearly explained was directly related to his loss of employment due to his work-related illness for which he was eventually awarded workers compensation benefits. Of particular importance, Somerville overlooked the fact that the “charge offs” cited in the bypass letter had been incorporated into the 2019 debt consolidation plan, pursuant to which he was making agreed bi-weekly payments to his creditors that would totally pay off all of those debts. Det. Faria actually cited Mr. Lima's efforts to restore his credit standing as a “positive” factor in his favor. Thus, the statement in the bypass letter that Mr. Lima had a “history of financial irresponsibility” lacks credible support in the evidence. Similarly, Mr. Lima's automobile was never repossessed in 2019

as the bypass letter stated and the credit report contains no such information; Somerville simply misread the credit report. As a result of these mistakes, Mr. Lima's credit issues are no reason to distinguish him from other candidates and do not justify bypassing him.

The second reason for bypassing Mr. Lima – an inadequate employment history – is equally flawed. The principal reason that Somerville found it “impossible” to assess Mr. Lima's “reliability, professionalism, and ability to work with others” or to verify his “a track record of being punctual and present at work” was its refusal to acknowledge his well-known employment history prior to 2016. That record includes a solid career over twenty years in security and law enforcement work, including Head of Security for a restaurant/bar (1995-2006), Hospital Police Officer/Constable (1997-2000), Security Officer (2005-2006), and County Correctional Officer/Deputy Sheriff (1999-2005 & 2008-2016).

I find it incomprehensible and extremely prejudicial for Somerville to conclude that it had no authority to assess Mr. Lima's professional qualifications, life and work experience and record of supervisor evaluations, punctuality and attendance, on the basis of Mr. Lima's full life and employment history. As Det. Faria confirmed, that approach flies in the face of the normal procedure that Somerville follows in conducting background investigations of a candidate for a position of a Somerville police or fire service employee. Turning a blind eye to Mr. Lima's pre-2016 employment record represents a serious violation of the duty of an appointing authority to conduct a reasonably thorough review of a candidate's background, as required by civil service law's basic merit principles.

Somerville's rationale for ignoring the facts known to Somerville about Mr. Lima's background prior to his 2016 bypass turns on an entirely wrong-headed interpretation of the order of relief provided to Mr. Lima by this Commission in *Lima I*, as well as a misinterpretation of the

terms of the 2019 MCAD Settlement. Agreement. The source of this advice was not identified (other than most witnesses said they believed it was someone from Somerville's HR Department), but Det. Faria, the background investigator, and all three of the interview panel members fully acknowledged that they followed this erroneous advice. I find it hard to believe that anyone in a position of authority, and especially any municipal official familiar with civil service and other employment law matters, would take the position that the Commission and/or the terms of a settlement of an employment discrimination claim could possibly have been intended to make it harder for Mr. Lima to successfully win a spot on the SFD the second time, after being unlawfully bypassed due to an appearance of disparate and discriminatory treatment the first time around. I find that such an interpretation is not consistent with the plain meaning of the relief granted in Lima I or the terms of the 2019 MCAD Settlement. This erroneous approach is another fatal blow to Somerville's rationale for bypassing Mr. Lima.

Moreover, Somerville did not even make a reasonable or thorough review of the background information gleaned from Mr. Lima's post-2016 employment history. For example, when asked in the SFD application form about his attendance record for the past five years, he wrote that he knew that was never tardy to work at any time back to 6/14/2015 but did not have a recollection or records prior to that date. Nothing in the record suggests he was asked further about it.

Similarly, I find that Somerville misconstrued Mr. Lima's work for the ride-share companies, labeling it "part-time" work, when he presented evidence that he worked daily, completed approximately 2500 trips annually (amounting to about 50 trips per week) and earned fees of approximately \$32,000 a year. Somerville also failed to recognize that, although his work as an on-call ride-share driver was not directly supervised, he was constantly evaluated by his customers and achieved a nearly perfect customer satisfaction rating from both companies--something he

likely could not have achieved without a record of punctual, safe, honest, responsible and competent service.

Somerville's third reason for bypassing Mr. Lima was alleged doubt about his ability to work in a team environment. This conclusion does not square with the information that Somerville *knew* about Mr. Lima. It ignores his interview responses which clearly showed his record and preference for working as a "team" (including his specific, spontaneous reference to the significance of teamwork in addressing the impaired firefighter scenario, discussed further below) as well as his exemplary institutional experience in especially challenging security and law enforcement work at a hospital, a restaurant and with a county sheriff. It is ironic that Somerville would claim it could not use Mr. Lima's substantial record of institutional employment for his benefit, but it could do so to impugn the credibility of his professed desire to return to that line of work again.

I do not overlook that a reasonable person might fairly question why Mr. Lima did not return to work for the same type of institutional employer as he had before he went on workers' compensation, although that seems to be more of an exigent lifestyle choice than a rational indicator of suitability to serve as a firefighter. I find Mr. Lima's explanation plausible – he was unemployed for nearly 18 months while he rehabilitated, he had a discrimination claim pending⁹⁹, and common sense suggests that going back into the same line of work, especially at his level, would not be quick or seamless. I cannot conclude that Somerville gave due consideration to Mr. Lima's explanation or justified why it could not take Mr. Lima at this word. While I acknowledge this single instance of possible rational inquiry, it cannot be considered in a vacuum and, in view

⁹⁹ The record does not indicate the basis of Mr. Lima's discrimination claim, but I note that at the time, his age would put him in a protected class.

of the other serious missteps involved here, it does not change my overall conclusion that Mr. Lima was not provided a fair consideration.

Somerville failed to persuade me that Mr. Lima's response to the impaired firefighter scenario provided reasonable justification for bypassing him. His answer cannot reasonably be construed as suggesting that he "seemed to take matters into his own hands." His response actually reflected a keen awareness of the serious nature of the situation and the need for a pro-active management approach that called for both (1) immediate action, i.e., pulling the firefighter out of service and (2) then managing the longer-term issue by bringing the firefighter, his union and his shift commander together so that appropriate action could be taken to address the underlying problem for the benefit of the whole "team", i.e., the firefighter and the department. Moreover, by holding Mr. Lima to a higher standard than other candidates because he should have known better, given his familiarity with "chain of command" structures, reflects the same inappropriate selective use of his past record that improperly tainted the equally unsupported doubt about his suitability for "teamwork" just discussed above.¹⁰

Finally, I take note that most of the candidates ranked below Mr. Lima received considerably more latitude than Mr. Lima did when it came to assessing their credentials and interview performance. Six of the ten originally appointed candidates had direct ties to "friends and family" in the SFD or other Somerville city employees. A few examples will suffice.

¹⁰ Somerville's position that it was less tolerant with Mr. Lima because he had "chain-of-command experience" than it would be other candidates who did not have that experience points to another telling problem with asking "realistic" hypothetical workplace scenarios of entry level candidates (only some of whom might be familiar with fire service protocol and procedure, perhaps, in some cases, through family or other connections). These types of hypothetical scenarios are appropriate in promotional candidates but, for the most part, not in initial hiring interviews.

Candidate C2 is related to two Somerville employees, yet his spotty recent employment record, most recently working for his mother, who wrote his employment reference was not problematic to the interview panel.

Candidate C4 has close ties to the Mayor's sister. His seasonal work as an Uber driver was not held against him because his other seasonal job was as a semi-pro hockey player, which the panel considered sufficient evidence of an ability to work in a "team" environment. Nor was his substandard answer to the impaired firefighter scenario, stating he would tell the firefighter to go home and report him to a supervisor only if he didn't cooperate, a problematic concern.

Candidate C7 was a Somerville DPW employee, known to the Confirmation Committee Chair since he was a Somerville junior high school student. He chose to play football instead of working full time, defaulted on student loans in 2013 and started repaying them in 2018. He equivocated on the impaired firefighter scenario because he didn't "want to be labeled as a rat Was a bit hesitant but ultimately would go to a supervisor." None of this blocked him from appointment.

Candidate C9's father was an SPD Lieutenant. The Confirmation Committee Chair stated in open session that she was the daughter of a firefighter and she knew the candidate "would fit well" due to the strong "bond" among firefighters at the SPD.

In addition, two other candidates provided equivocal answers to the impaired firefighter scenario. As noted by Chief Breen, Candidate C3, who was a full-time firefighter (and certainly understands "chain of command") answered the question without stating that he would "notify night commander immediately." Similarly, Candidate C5's response to impaired firefighter scenario was to "encourage" him to go to his supervisor and report him only if he did not.

In sum, the proof of the many substantive flaws in the consideration of Mr. Lima's candidacy on the merits requires that he be given another thorough review and opportunity for appointment;

moreover, the examples of disparate treatment and overtones of nepotism that represent serious violations of the core principles of civil service law require, in addition, that, in any future consideration, specific additional safeguards must be employed to ensure that he is fair and impartially considered.

CONCLUSION

For all of the above stated reasons, the bypass appeal of Henry Lima, under Docket No. G1-21-077, is allowed. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission orders that the Massachusetts Human Resources Division (HRD) and/or the City of Somerville (Somerville), in its delegated capacity, take the following action:

- A. Place the name of Henry Lima at the top of all current and future certifications for appointment to reserve and/or permanent, full-time firefighter with the Somerville Fire Department (SFD) so that he is first in line for appointment to the next available vacancy in a position as a permanent, full-time SFD firefighter until he is so appointed or bypassed.
- B. In any future consideration of Mr. Lima, Somerville shall not bypass him as a result of any facts or circumstances of which it had knowledge of prior to this Decision and, specifically, without limitation, for any reasons which this Decision has found insufficient as a basis to bypass him.
- C. Should Mr. Lima be appointed as a SFD reserve and/or permanent full-time firefighter, he shall be given the same civil service seniority date he would have received had he been appointed as a Reserve Firefighter with the SFD from Certification 06668.
- D. If Mr. Lima is bypassed for appointment to reserve and/or permanent, fulltime SFD Firefighter, at least one candidate appointed from that certification shall be made as a temporary appointment until such time as: (1) Somerville has provided Mr. Lima with

reasons for bypass; (2) Mr. Lima has had the opportunity to file an appeal with the Commission; and (3) the Commission has issued a final decision related to the bypass.

- E. Once the Appellant has been provided with the relief ordered above, Somerville shall notify the Commission, with a copy to Mr. Lima, that said relief has been provided. After verifying that the relief has been provided, the Commission will notify HRD that Mr. Lima's name should no longer appear at the top of future certifications.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Stein & Tivnan, Commissioners) on August 25, 2022.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Henry Lima (Appellant)

Jason Piques, Esq. (for Respondent)

Michele Heffernan, Esq. (HRD)

Regina Caggiano (HRD)